Nos. 14990-14991-14992

United States
COURT OF APPEALS
for the Ninth Circuit

REYNOLDS METALS COMPANY, Appellant,
vs.
PAULA MARTIN, By and Through Arthur H. Lewis, Her Guardian Ad Litem, Appellee. — **No. 14990**

REYNOLDS METALS COMPANY, Appellant,
vs.
VERLA MARTIN, Appellee. — **No. 14991**

REYNOLDS METALS COMPANY, Appellant,
vs.
PAUL MARTIN, Appellee. — **No. 14992**

BRIEF IN ANSWER TO PETITION FOR REHEARING

Appeals from the Final Judgments of the District Court for the District of Oregon.

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PRELIMINARY STATEMENT

Paul Martin, Verla Martin, and Paula Martin, by her guardian ad litem, each commenced a separate action in January, 1952, in the District Court for the District of

Oregon, to recover damages for personal injuries resulting from exposure to poisonous effluents from the Troutdale, Oregon, plant of Reynolds Metals Company. The actions were combined for trial and were tried August 25 to September 15, 1955, before Judge East and a jury. Trial resulted in a verdict and judgment in favor of the plaintiff in each of the cases. Meantime, Paula Martin had married and become of age and is now Mrs. Yturbide.

Reynolds Metals Company appealed from each of the judgments. The appeals were consolidated, and the combined cases were argued before Judge Denman, Judge Pope and Judge Chambers. Decisions were announced in each case on April 24, 1957, affirming the judgments of the trial court in all respects. Opinions were written by Judge Denman. Judge Pope concurred. Judge Chambers dissented as to a minor question concerning a portion of an order entered before the trial limiting scope of a deposition in two of the cases, but concurred with the opinion of Judge Denman in affirming the trial court in all three cases.

Judges Pope and Chambers have granted a rehearing and have given the Appellees, the Martins, the opportunity of filing a brief in response to the Petition for Rehearing.

This brief will be devoted to the contentions raised in the petition. The non-applicability of the statute of limitations, involved in only two of the cases, has been covered in our previous brief, has been decided adversely to Appellant, and has not been mentioned in the Petition for Rehearing, granted for all three cases. We therefore

consider this legal issue settled and will not burden the Court with further argument.

Likewise, the admissability of evidence with respect to injuries to cattle by the fluoride emanations has been briefed, has been decided adversely to Appellant and not mentioned in the Petition for Rehearing. This matter of the relevancy of evidence we think will need no further attention here.

FACTUAL SUMMARY

We first submit a summary of the factual situation for the members of this Court who may not be familiar with all portions of the 2,018 page record.

In December, 1946, the Appellees, Paul Martin and Verla Martin, husband and wife, farmers and cattle raisers by occupation, having within the previous two years acquired a farm near Troutdale, Multnomah County, Oregon, commenced living on the farm with their then minor daughter, Paula Martin, now Mrs. Yturbide. This farm upon which they lived and worked lies along the south bank of the Columbia River at about the point where the river emerges from the Columbia Gorge. The westerly line of the farm is the Sandy River. A quarter of a mile or thereabouts west of the Sandy River, where it borders the farm, the Appellant, between September 23, 1946, and November 30, 1950, operated a large plant for the production of aluminum. During this time, in the production of aluminum by the process used by Appellant, huge quantities of fluorides (measured in tons per day) were given off and escaped from the plant and permeated the atmosphere. These fluorides, slightly heavier

than air, blew over and settled upon surrounding lands, mostly within the area within four miles from the plant. They settled upon (and were also absorbed by a stomatic process into) the vegetables and plants on the exposed lands. Persons and animals on these lands ingested the fluorides by inhalation, by drinking contaminated local waters, and by eating the plants impregnated with the fluorides.

The Martin farm was in the direction of the prevailing winds blowing up and down the Columbia Gorge and suffered more than the usual exposure to these fluorides. The concentrations of hydrofluoric acid over their farm were sufficient to etch the windows of their residence. The cattle on the farm were sickened and many of them died of these poisons.

The principal fluorides emitted from the plant and to which the Appellees were exposed were cryolite or sodium aluminum fluoride (not to be confused with sodium fluoride, sometimes used in quantities of one part per million or less in the public water supply to reduce decay of the teeth of children), hydrofluoric acid, calcium fluoride, iron fluoride and silicon tetrafluoride, all of varying degrees of toxicity, but all highly poisonous.

The output of these poisons from the plant of Appellant up until the month of November, 1950, when a fume control apparatus was put into operation, was tremendous in quantity. The fluorine content of the fluorides emitted, daily, January through December, 1947, was 2,845 pounds, and in January, 1950, 3,281 pounds (R. 425).

By the latter part of 1950, as a belatedly installed fume control system was placed in operation, the daily output of fluorides decreased. In March, 1950, the daily output was 3,988 pounds; by November, 1950, the daily output was down to 643 pounds (R. 434).

As to the contamination of the farm on which the Appellees lived there is no dispute. The Pre-Trial Orders recite as Agreed Facts that the fumes emanating from the plant into the atmosphere, in the form of gases, liquids and solids, became air borne and portions settled at various times upon the lands of the Appellees. (R. (27-8; 30; 30)*

Of the toxic qualities of hydrofluoric acid, cryolite, calcium fluoride, iron fluoride and silicon tetrafluoride, agreed to be the principal effluents, there is also no doubt. Their toxic qualities were described by the physicians, chemists and other witnesses who testified at the trial. Appellant's brief on this appeal states (page 17) that these fluorides are poisonous in excessive amounts. The Petition for Rehearing refers (p. 3) to the hazard to cattle, and to extensive efforts and the expenditure of tremendous sums of money to eliminate the hazard. Again (pp. 4-5) the petition, by stating that fluorine is not toxic unless ingested in excessive concentrations, concedes their toxicity if ingested in amounts above a purely theoretical tolerance level. The petition describes the activity of Appellant (p. 13) as "dangerous only if

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* References are to pages in the Transcript of Record, abbreviated to "R." in cases numbered 14990, 14991 and 14992 in the same order.

the concentrations of fluoride given off are large enough to be toxic."

The Martins were rendered ill as the result of their exposure to these emanations from Appellant's plant. In November, 1950, they moved away from their farm to avoid further exposure, when they ascertained from physicians the cause of their illness. These actions were then commenced to recover their damages for the injuries sustained during the period of exposure.

ISSUES ON APPEAL

I.

Proceedings Before Trial

In a statement of points on the appeal (R. 88-91; 60-63; 62-66) the Appellant claimed that the trial court was in error, in the case of Paul Martin and in the case of Verla Martin, in limiting, in a pre-trial deposition, the scope of the examination of two physicians who had attended these two plaintiffs, to exclude privileged communications.

This minor assignment of error, which has no reference to the case of Paula Martin Yturbide, will be disposed of at this point in our brief.

Early in 1952, shortly after the cases were commenced, the defendant served interrogatories upon the plaintiff, Paul Martin, and likewise upon the plaintiff, Verla Martin, under defendant's rights under Rule 33, F.R.C.P. Also early in 1952, the defendant took the de-

position of each of these plaintiffs, under defendant's rights under Rule 26.

Two and one-half years later, with the case set for trial on August 25, 1955, the defendant, Appellant here, gave notice of taking the deposition of Dr. Hills and Dr. Proctor, in Baltimore, Maryland, on August 16, 1955 (R. 14 in cases 14991 and 14992). Each plaintiff objected to the taking of the depositions at the time and place indicated in the notice because of the expense involved in sending a lawyer to Baltimore. Each also moved for a ruling that the defendant be not permitted to examine Dr. Hills or Dr. Proctor concerning information acquired by him in attending plaintiff, which information was necessary to enable him to prescribe or act for the plaintiff (R. 15-19 in cases 14991 and 14992).

The objections and the motion to limit the scope of the depositions of these physicians came on to be heard before Judge East. The day before the time set in the notice for the taking of the depositions, Judge East wrote a letter to the attorneys (R. 73-5 in case 14990). He stated that he had found neither expressed nor implied waiver of the privilege created by Section 44.040, O.R.S., and that therefore objections to the questioning of the doctors, so far as relating to information acquired in attending the plaintiff, necessary to enable them to prescribe or act for the patient, would be sustained. Otherwise he permitted defendant to proceed with the depositions in Baltimore the following morning.

The deposition of Dr. Hills was actually taken by the Appellant at the time specified in the notice, before any

order was signed by Judge East, and in the absence of any attorneys representing the plaintiffs. The deposition is listed in the Pre-Trial Order as Exhibit No. 553 (R. 50).

The order limiting the scope of the inquiry to exclude the privileged communications was not actually signed by the judge until after the deposition of Dr. Hills had been taken (R. 83-4; 53; 55). Dr. Proctor apparently was not available for examination.

In the course of the trial both Paul Martin and Verla Martin testified concerning medical matters and thereby waived their statutory privilege. Appellant was in a position, if Appellant saw fit, to offer in evidence the deposition of Dr. Hills, or was in a position to present Dr. Hills or Dr. Proctor, or both, as witnesses in the case. Appellant did neither. This was not for lack of zeal, as Appellant did produce Dr. Machle, from Ft. Lauderdale, Florida, who had been employed by the plaintiffs and who had consulted with them concerning their illness.

Consequently, Appellant cannot complain of any error of the trial court with reference to privileged communications since Appellant had full opportunity to cure the error complained of by using the deposition taken or producing the witnesses after the privilege had been waived.

This point of the appeal is without legal merit in any event. The Federal Rules of Civil Procedure are what they are designated, rules of procedure, and not rules of substantive law.

The law with respect to privilege and conduct waiving privilege is to be administered by the federal courts in diversity cases in accordance with the law of the state, in this case Oregon law.

Appellant in the Petition for Rehearing quotes from *Munzer v. Swedish American Line* (S.D.N.Y. 1940), 35 F. Supp. 493. This case holds:

> "On the question of privileged communications the Federal Courts follow the law of the state of the forum. Federal Mining & Smelting Co. v. Dalo, 9 Cir., 252 F. 356; Pennsylvania Railroad Co. v. Durkee, 2 Cir., 147 F. 99, 8 Ann. Cas. 790; Thompson v. Smith, 70 App. D.C. 65, 103 F. 2d 936, 123 A.L.R. 76; Aetna Life Ins. Co. v. McAdoo, 8 Cir , 106 F. 2d 618; Adamos v. New York Life Ins. Co., D.C., 22 F. Supp. 162 affirmed, 3 Cir., 94 F. 2d 943." (p. 496)

The Court then examined the law of the forum, New York, and determined that under the law of New York privilege is waived when "at the trial or *in an examination preparatory* thereto" a party entitled to assert a privilege expressly or impliedly waives it. The Court held that *under New York* law the privilege had been waived by the proceedings in an examination preparatory to trial.

Under the law of Oregon, which governs this situation, submission to examination before trial does not waive the privilege. Under the terms of the Oregon statute the privilege is waived only if a party offers himself as a witness.

The opinion of Judge Denman in this respect was completely correct.

II.

The Principal Issue of Directed Verdict

In addition to the before-trial procedural question above discussed, the Appellant has presented by this appeal the broader question of whether or not the cases should have been permitted to go to the jury.

We think that preliminary to a discussion of this question this Court should have in mind the issues of fact and of law in the court below.

Issues of Fact and of Law in the Court Below

The parties stipulated just before the trial commenced as to many of the facts in the cases. They also stipulated that upon trial no proof would be required as to the matters of fact agreed upon. They further stipulated the issues, of fact and of law, and that the Pre-Trial Order superseded the pleadings (R. 63; 36; 37). Parenthetically more properly perhaps the recitation in the Pre-Trial Order should have been that the precise issues were set forth in the Pre-Trial Order rather than in the pleadings.

The issues of fact, so far as now material, were:

(1) Did plaintiff sustain personal injury as a proximate result of absorption of the fluorides from defendant's plant?

(2) If so, were such injuries
   A. Caused by negligence of defendant in operating the plant; or
   B. Knowingly, wilfully or intentionally caused; or
   C. Caused by the trespass by defendant upon the person of plaintiff?

(3) Were such injuries the result of plaintiff's own negligent conduct?

(4) The amount of damages fairly to compensate for such injuries (R. 32; 34; 35).

Thus the now material issues were whether the injuries were caused by the negligence of the defendant in the operation of the plant, or were caused by trespass of the defendant upon the person of plaintiff.

The issues of law (aside from the application of the statute of limitations and from the right to recover punitive damages) were whether plaintiff might recover for "negligently caused personal injuries" or because of trespass upon the person of plaintiff (R. 33; 35; 36).

The Issue of Negligence

As we have shown, the issues stated in the Pre-Trial Order were whether a recovery might be had on a showing of negligence, or on a showing of trespass upon the person of plaintiff. The trial judge thoroughly considered the matter before the trial concluded, and wrote a clear, concise opinion, reported in 135 F. Supp. 379.

In this opinion Judge East indicated that the "doctrine of Rylands v. Fletcher or the strict liability and ultra hazardous condition theories of liability generally refer to trespass on property as distinguished from person" (p. 380).

The Oregon Supreme Court, said Judge East, had applied "the pure and simple rule of negligence with the test or measure of ordinary due care and gave plaintiff the benefit and evidentiary aid of the so-called doctrine of res ipsa loquitur" (p. 381).

The Judge found: "it is agreed by all the experts who appeared here that the majority of these compounds are toxic or poisonous, but the debate between the experts and the question the jury is going to have to determine, is at what point or quantity do these compounds become poisonous or are likely to become poisonous and harmful to humans" (p. 380).

Under the circumstances Judge East held that, "When the plaintiff proved the emanation of fluorine compounds from the plant of the defendant and the injury suffered by him as a result thereof, he made out a prima-facie case of negligence on the part of the defendant" (p. 382).

The opinion carefully points out that a prima facie case is made only when the compounds "did become deposited on plaintiffs' lands to such an extent that they did receive into their systems these compounds and did become poisoned thereby" (p. 382).

And, also in the instructions given to the jury, Judge East carefully limited the application of the rule of res ipsa loquitur. He instructed that an inference of negligence arose only when the fluoride compounds coming from defendant's plant were "of such quantity which would injure persons living and being in the vicinity of its plant, and particularly each of the plaintiffs (R. 1880).

Tolerance Level

The Appellant contends that as a *matter of law* the quantities of fluorides which its operation spewed forth and to which the Appellees thereby became exposed

were not sufficient to cause harm to the Appellees. This contention is reiterated throughout the Brief on Appeal and the Petition for Rehearing. It is expressed in numerous ways. The Appellant (Ptn. pp. 6-7) accuses this Court of having found to be poisonous an amount of fluorine which scientific and judicial opinion has unanimously found harmless heretofore, and of having chosen to disregard efforts to reduce the emanations "far beyond the danger point." This is said to be one of the "serious errors of law contained" in this Court's decision.

The question is, shall some theoretical point or measurement, supplied *ex cathedra* by the aluminum industry and its hirelings, be binding upon the courts to the exclusion of direct and positive proof to the contrary.

It has been demonstrated in numbers of cases, in Tennessee, Utah, Washington, Oregon, and elsewhere, that the fluoride compounds coming from the stacks of aluminum reduction plants (and other industrial plants producing fluorides) have injured, sickened and killed cattle and other mammals. It has been demonstrated that these effluents also have injured plants. In fact, some plants such as buckwheat are used as indicator plants to detect contamination. Many instances of human injury are referred to in the medical literature. For 30 years or thereabouts various experiments, under strict controls, have been made with human beings. The Appellant in its brief says (p. 19):

> "A survey made by the United States Public Health Service in 1943 and 1944 had included appellant's plant at Longview, Washington, which was then operating without any fume control system. The Pub-

sufficient to harm the Appellees; and this Court, in the face of these facts and the findings of the jury, cannot say that as a matter of law the exposure to which the Appellant subjected the Appellees did not injure them.

Foreseeability

Just how necessary it may have been for Appellees to prove that Appellant should have foreseen the consequences of its acts, need not here be considered, for the simple and conclusive reason that, necessary or not, Appellees offered definite proof that Appellant, had any care been exercised, would have realized the probable results of its activities. In fact from the proof the conclusion is inescapable that Appellant was fully cognizant of these probable consequences.

In the first place, we learn from the Agreed Facts in the Pre-Trial Order that the United States of America, through R.F.C., leased the plant to Appellant in 1946 (R. 22; 25; 25). Next we learn from the Arvidson case (Arvidson v. Reynolds Metals Company, 125 F. Supp. 481 at 483) that under the lease the Government had contractual obligations to the Appellant concerning claims for injuries caused by the fluoride emanations from this Troutdale plant, and for re-acquisition of the plant in the event operation thereof should be enjoined. In other words, the Appellant before leasing the plant actually anticipated and contracted concerning its liability for these and similar claims for injuries caused by the effluents resulting from its operation.

Appellant in 1946 was not a new-comer to the aluminum business. Its Longview, Washington, plant had then

been operating since April, 1941 (R. 1276). Judge Boldt stated in the Arvidson case (p. 483) that in a number of cases previously heard in his and other courts in the area judgments had been awarded for fluorine damage resulting from operation of the Troutdale and Longview plants.

Since 1931, in behalf of industry, the Kettering Laboratories had been conducting extensive experiments with the problem of fluorosis in humans, and Appellant was a financial supporter of this institution (R. 1003).

Mr. Zeh, Control Engineer, attended a "health injury" meeting at the Kettering project in March, 1947 (R. 1556).

The Appellant had a library containing medical literature dealing specifically with human injury due to ingestion of fluorides. In the Pre-Trial Order, Appellees have listed as Exhibits L-1 to L-27, inclusive, a portion of the available literature, both for humans and other mammals; and Appellant has listed as Exhibits 597 to 613, inclusive, other portions of such literature.

It is unnecessary to detail in this brief the numerous additional circumstances in the evidence leading to the inevitable conclusion that the Appellant was actually aware, or in the exercise of reasonable care should have been aware, of the probable consequences of its acts.

The rule in Oregon, as set forth in Shelton v. Lowell, 196 Or. 430 (Appellant's Brief p. 24), is that, if under all the circumstances in the exercise of ordinary care a person can discern that his act will naturally and prob-

ably result in harm of some kind to another, liability follows even though the exact form of the injury is not necessarily foreseen.

The trial court did not neglect to refer to the element of foreseeability in his instructions to the jury. The instructions contained (R. 1875) a statement of the contention of the Appellees that Appellant "operating the reduction plant had full knowledge of the dangerous characteristics of fluoride compounds emanating from the plant and had full knowledge *of the likelihood of injury* to the persons" of the Appellees. Later the judge instructed (R. 1877) that the Appellant owed the duty to persons lawfully within the vicinity and within the area "reasonably, *likely or expected to be affected* by such operation, not to be negligent in the course of such operations to such parties or persons in the vicinity, thereof" (R. 1877).

This was followed by the further instruction that "the question of negligence, if any, must be determined according to the standard of ordinary care and caution in the light of what *should reasonably have been anticipated as reasonably likely to occur* under the existing circumstances at the time involved" (R. 1881).

The overwhelming proof in these cases leads to the conclusion that the Appellant knew or should have known of the dangers likely to result from its activities, if indeed not to the conclusion that the activities were carried on wantonly, recklessly and with a total disregard of the actually anticipated and expected consequences.

The instructions to the jury were more favorable in this respect than Appellant had any right to expect. The jury was instructed that Appellant was not an insurer against injury to persons residing in the vicinity of its plant (R. 1876), and was instructed that recovery for injuries to persons in the vicinity of the plant might be had only if such injuries were reasonably, likely or expected to result from the operation. The jury was not permitted to consider or assess any award by way of punitive or exemplary damages for any wilful, intentional or reckless conduct of the Appellant, even though it continued to belch forth its toxic compounds in ever increasing quantities throughout the entire period of the exposure of these Appellees.

The Degree of Care Exercised

The Appellant says (Ptn. p. 14) that, "By the exercise of care, any risk to residents surrounding an aluminum plant *can* be eliminated."

Then the Appellant says (Ptn. p. 14) that, "Appellant has tamed the fluorides and muzzled them to boot."

The difficulty for Appellant is that the fluorides were tamed and muzzled after, but not before, the harm had been done.

In spite of all of the protestations of Appellant concerning "four years of persistent effort and tremendous expense" (Ptn. p. 4) to tame and muzzle the fluorides, the record in this respect is entirely against Appellant. The writer of the petition apparently had not read the Agreed Facts of the Pre-Trial Orders. They recite that

before operation of the plant by Appellant ever commenced in September, 1946. Appellant installed in the roof vents some water pipes and spray heads; then that "about June 1, 1949, defendant commenced the construction of a gas, fume and particulate collecting system at said plant. The installation of this system was completed on or about November 3, 1950" (R. 26; 29; 29—See also R. 434).

The muzzling and the taming of the fluorides commenced actually in the latter months of the year 1950. This is shown by the record supplied by Mr. Zeh, Chief Chemist and Control Engineer, and for the benefit of the Court his record follows:

FLUORINE CONTENT OF FLUORIDES
ESCAPING IN POUNDS PER DAY

(The fluorine content is approximately half of the weight of the fluorides.)

1947,	January through December	2,845
1948,	January through December	2,840
1949,	January through December	2,640
1950,	January	3,281
	February	3,795
	March	3,988
	April	3,216
	May	2,895
	June	2,187
	July	1,608
	August	1,480
	September	1,160
	October	900
	(R. 424-6)	
1950,	December	643
	(R. 434)	

Certainly from this record of emissions of poisons it cannot be said that the trial court was wrong in submitting to the jury, as a question of fact, whether the Appellant had used due care under the circumstances.

If there is any evidence to support the finding of the jury such finding is binding and conclusive on the courts. The governing Oregon law is stated thus in Phillips v. Colfax Company, 195 Or 285 (at 302):

> "We have frequently and consistently defined the powers and limitations of this court when called upon to review alleged errors predicated upon a trial court's refusal, as here, to grant motions of nonsuit or motions for a directed verdict in law actions. In Fish v. Southern Pacific Co., 173 Or. 294, 301, 143 P2d 917, 145 P2d 991, we said:
>
> "'* * * In considering the propriety of these rulings, the motions must be regarded and having admitted the truth of plaintiff's evidence, and of every inference of fact that may be drawn from the evidence. The evidence itself must be interpreted in the light most favorable to plaintiff. McCall v. Inter Harbor Nav. Co., 154 Or 252, 59 P2d 697. Where the evidence conflicts, the court may not infringe upon the function of the jury by seeking to weigh or evaluate it, but is concerned only with the question of whether or not there was substantial evidence to carry the case to the jury and to support the verdict. Ellenberger v. Fremont Land Co., 165 Or 375, 107 P2d 837; Allister v. Knaupp, 168 Or 630, 126 P2d 317.'"

The Oregon law is announced in Ritchie v. Thomas, 190 Or. 95, and Gow v. Multnomah Hotel, 191 Or 45, and Appellant (Brief p. 26) quotes happily therefrom. According to the quotations there must be reasonable evidence of negligence, but where the instrumentality

doing injury is shown to be under the control and management of the defendant, and the accident is such as, in the ordinary course of events, does not happen if those who have the management use ordinary care, the jury may infer that the accident arose from want of care on the part of the defendant.

Here we have an aluminum plant under the exclusive control and management of a defendant, which instrumentality by emitting harmful toxins injured plaintiff. The accident would not have happened if defendant had prevented the escape of the harmful effluent. The defendant knew, or should have anticipated or foreseen that the effluent if permitted to escape might cause harm, yet permitted it to escape. From this the jury might, and did, infer that defendant (Appellant) was careless.

On the assumption that the choice of theories of liability made by the trial judge was correct, that the cases should be governed by rules of negligence, rather than of trespass, the submission of the cases to the jury was entirely proper, and failure to have submitted the cases to the jury would have been entirely improper.

APPELLANT'S ARGUMENT FOR ANOTHER HEARING

We come now to consider more particularly the arguments presented by Appellant in the Petition for Rehearing, except for the matter of privileged communications, which we have heretofore covered.

I.

"Far Reaching Effects" of the Decision in This Case

For a first point in the petition (pp. 2-8) the Appellant, after describing the decision of this Court as a "manifest injustice" imposing upon it an "unprecedented liability" certain to "produce the severest repercussions on the conduct of heretofore lawful industry," and after making some pointless comparisons between iodine and fluorine—we could as appropriately say that citric acid, lemon juice, may be imbibed without harm and therefore so could sulphuric acid—submits that there should be a rehearing to correct "what are submitted to be serious errors of law."

Upon analysis, the reference to the serious errors of law comes down to nothing more or less than a contention of a conflict between the decision in these cases and a decision in the case of Arvidson v. Reynolds Metals Company, 236 F. 2d 224.

Let us now consider this contention.

The Arvidson case, which has heretofore been referred to in this brief, was a combined case of a considerable number of farmers seeking damages and injunctive relief against Reyonlds Metals Company, Appellant herein. Fumes from Appellant's Troutdale plant in Oregon, and its Longview plant in Washington, were alleged to have injured dairy cattle on the lands of the farmers and depreciated the market value of the farm land. The farmers' cases, involving farm lands in Washington scattered over a considerable area, were combined for trial and tried by Judge Boldt, sitting without a jury.

Judge Boldt, as the trier of the facts found for the defendant on the factual issues, finding (a) that defendant did not deposit any toxic quantity of fluorine compounds on the farmers' lands; (b) that the forage on the lands had no substantial fluorine content attributable to effluents from the defendant's plants; and (c) that plaintiffs' lands and cattle had sustained no fluorine damage with reasonable or any certainty (125 F. Supp. at 486).

In the Arvidson case a later time and a different set of conditions were involved, in that during the time concerned in the Arvidson case the fume control systems were largely in and operating, whereas in the present cases the fume control system at the Troutdale plant commenced operating only the last few weeks of the exposure period.

Also in the Arvidson case the farms were at varying distances from the plants, some as many as seven miles, and in varying directions, and not in the fall-out area, whereas in these cases the Appellees were only a short distance from the reduction plant, admittedly in the fall-out area, and in the direction of the prevailing winds, or as Appellant described it (Brief, p. 4) "upwind" from the plant.

Also in the Arvidson case the trier of facts did not find as a fact any deposition of fluorides on the lands of the farmers attributable to the operation of the aluminum reduction plants, whereas in the present case the deposition of fluorides on the Martin property during each of the years 1947, 1948, 1949 and 1950 was admit-

ted (R. 430) and the air borne contamination was one of the agreed facts of the cases (R. 28; 30; 30).

Also in the Arvidson case the trier of the facts found no damage to the cattle of the farmers and found no depreciation in the grazing quality or market value of their lands. In these cases the jury, as the trier of the facts, found substantial damage to each of the Appellees attributable to the effluents of Appellant.

On the appeal of the Arvidson case this Court was unable to say that the findings of fact made by the trier of the facts, Judge Boldt, were clearly erroneous. A finding of fact made by a judge sitting without a jury may be overturned only if it is clearly erroneous, Rule 52 (a) F.R.C.P.; Appellant's Ptn. Rehearing, p. 15. On this basis this Court affirmed the trial judgment in the Arvidson case.

By the same token, this Court, being unable to say that the findings of the jury were without any support by any of the evidence, should not overturn the verdicts of the jury.

Under Oregon law, which this Court applies in diversity cases, the verdict of the jury may not be set aside if there is any evidence to support it. Constitution of Oregon, Art. VII, Sec. 3, and see again Phillips v. Colfax Company, supra.

There is no inconsistency in this Court's affirming the Arvidson case and also affirming these cases, as in neither instance can or should this Court say that the trier of the facts was clearly wrong.

Judge Boldt in the Arvidson case discussed the law of Washington, which governed, and was of opinion that under Washington law the action of the farmer plaintiffs lay either in trespass on the case or nuisance.

In these cases the Court is considering Oregon law. The affirmance of the judgments as sustainable under Oregon law leads to no conflict whatever with any opinion of this Court in the Arvidson case.

We deem it unnecessary, in considering this first point of Appellant, to respond to the extraneous and irresponsible statements in the petition as to the social and economic consequences, or the severest repercussions, or the future of the aluminum industry, flowing from this Court's affirming a judgment requiring payment of a modest sum for the personal injuries Appellant tortiously caused.

This case is aptly described by Justice Frankfurter in McAllister v. United States, 348 U.S. 19, 75 S. Ct. 6, as "no more than an ordinary action for negligence, giving rise, as is frequently the case, to conflict in evaluation of the evidence."

II

Burden of Proof

The gist of this point in the Petition for Rehearing (Ptn. pp. 9-12) seems to be that an industrial plant may throw out poisons and injure people in the neighborhood *with impunity unless* a plaintiff injured by the effluent produces evidence that the poison producer could with reasonable effort have eliminated the escape of the

poisons. It is argued that Appellant made a reasonable effort to find and install better fume controls, and finally reduced the output of fluorides to all but ten percent of the amount created, and there was no "showing by appellees that this reduction of 90 per cent of the fluorides released *could* have been done any earlier" (Ptn. p. 10), and hence Appellees should have been non-suited.

This rule so urged by Appellant should be captioned ASSAULT WITH IMPUNITY. Under this rule so urged poisons could be spread about by an industrial concern to such extent as to kill the people in the neighborhood, with no civil liability because no claimant could come forward with proof that a more confining control apparatus to hold in the poisons was immediately available and not used.

Fortunately the ASSAULT WITH IMPUNITY Rule is not the law of Oregon. The least favorable rule for Appellees, and the most favorable for Appellant, is the rule of res ipsa loquitur, applied by the trial judge. The mere fact that the poison did escape and do damage is enough to permit the jury to infer that the maintainer of the poison producing instrumentality was careless. Due care requires that the poison be confined, not that only some reasonable effort to confine it be made.

As the late Judge Cardozo said in McFarlane v. Niagara Falls, 247 N.Y. 340, 160 N.E. 391, 57 A.L.R. 1:

> "One who emits noxious fumes or gases day by day in the running of his factory may be liable to his neighbor though he has taken all available precautions. (Citing authorities) He is not to do such things at all, whether he is negligent or careful."

The Oregon law we will discuss under the heading of the next point of Appellant's Petition (pp. 13-15), which we have taken the liberty of recaptioning, as we dislike the reference to the work of this Court as branding.

III

Rylands v. Fletcher

The Supreme Court of Oregon has repeatedly held that one who invades his neighbor's lands—whether with toxic compounds, noxious fumes, sewage waters, pick and shovel or ax, or howsoever—is liable as a trespasser for the damage thereby occasioned. This rule is supported by the following cases:

Mendenhall v. Water Co., 27 Or. 38;
Allen v. Dunlap, 24 Or. 229;
Bishop v. Baisley, 28 Or. 119;
Chapman v. Dean, 58 Or. 475;
Kesterson v. California-Oregon Power Co., 114 Or. 22;
Matthews v. Chambers Power Co., 81 Or. 251;
Roots v. Boring Junction Lumber Co., 50 Or. 298;
Huber v. Portland Gas & Coke Company, 128 Or. 363;
Brown v. Gessler, 191 Or. 503;
Bedell v. Goulter, 199 Or. 344.

The United States District Court for Oregon has announced the same rule:

Ure v. United States, 93 Fed. Supp. 779;
Cartwright v. Southern Pacific Co., 206 F. 234;
Thorup v. Reynolds Metals Co., Civil No. 5884.

The Oregon Supreme Court has also said that when one invades his neighbor's lands with damage-causing illuminating gas, or with over-flowing waters negligence

on the part of the invader will be imputed as a matter of law.

> Sharkey v. Portland Gas Co., 74 Or. 327;
> Mallett v. Taylor, 78 Or. 208.

The Supreme Court of Oregon has also said that one who invades his neighbor's lands with water from a bursting water tank is presumed to have been careless, and is prima facie liable for the damage occasioned under the rule of res ipsa loquitur. The plaintiff is not required to give direct evidence of negligence on the part of the defendant, inasmuch as proof of the manner in which the accident occurred is in itself, under this rule of res ipsa loquitur, a prima facie showing of negligence; when plaintiff proves the accident and the injuries suffered as a result thereof, he makes out a prima facie case and it is a question for the jury with all the evidence before it whether the preponderance of such evidence is in favor of plaintiff.

> Suko v. Northwestern Ice Co., 166 Or. 557 (at 566 and at 568).

In the trial of these cases the trial judge chose to submit the cases on the third (and most favorable to Appellant) of these alternative rules of liability. The jury found the Appellant careless, in permitting effluents to escape, found injury to each Appellee by the escaping effluents, and awarded a modest amount in favor of each Appellee for the injuries sustained.

Appellant has a contention that its evidence showing "persistent effort" (due care) to minimize the output of fluorides was not contradicted, and therefore res ipsa

loquitur should not have been used to take the case to the jury. In Prosser, Law of Torts, Second Edition, page 216, we find this statement of the law:

> "But if the defendant merely offers evidence of his own acts and precautions amounting to reasonable care, it is seldom that a verdict can be directed in his favor. The inference from the circumstances remains in the case to contradict his evidence. If he testifies that he used proper care to insulate his wires, to inspect his chandelier, to drive his bus, or to keep defunct mice and wandering insect life out of his bottled beverage, the fact that electricity escaped from the wires, that the chandelier fell, that the bus went into the ditch and the bug was in the bottle, with the background of common experience that such things do not usually happen if proper care is used, may permit reasonable men to find that his witnesses are not to be believed, that the precautions described were not sufficient to conform to the standard required or were not faithfully carried out, and that the whole truth has not been told."

In Ure v. United States, 93 F. Supp. 779, at 788, applying the Oregon law, Judge Fee said:

> "the person who is in the exclusive management and control of such a dangerous instrumentality is liable on mere proof of damage occurring as a result of the operation thereof, unless perchance he can establish the injury was caused by Act of God, by the act of a third person or by act of the plaintiff himself. This technical device for fixing liability is commonly called res ipsa loquitur."

In Bartlett v. Grasselli Chemical Co. (W. Va.), 115 S.E. 451, the Court said:

> "The furnaces and business working the injury are located and conducted upon the defendant's own land. It is clearly within its powers to abate the nuisance, by an alteration of its furnaces or methods

of operation, *or by cessation of the operations working the injury*. . . ."

The fluorine compounds escaped from the reduction plant, just as the electricity escaped from the wires, the chandelier fell, the bus went into the ditch, the bug was in the bottle, and all of the "persistent efforts" of Appellant to prevent the escape cannot erase the inference of carelessness. Besides all this, the evidence showed that during the four year period the Appellant voluntarily put forth increasing, rather than diminishing quantities of the fluorides, thus further showing negligence. The failure to suspend or cease operations until the fume controls were installed and operating was further evidence of negligence.

Neither on the law, nor on the facts, should the cases have been withdrawn from the jury.

In the opinion of Judge Denman is the statement that, "We think that the doctrine of Fletcher v. Rylands also applies." This statement is entirely correct under the Oregon law, though not strictly necessary to the decision, inasmuch as the trial court had not instructed the jury concerning strict liability but had instructed on the milder rule of res ipsa loquitur.

It may not be inappropriate to direct attention to some of the cases from jurisdictions other than Oregon.

In McFarlane v. Niagara Falls, 247 N.Y. 340, 160 N.E. 391, 57 A.L.R. 1 (1928), the court said:

> "Nuisance as a concept of law has more meanings than one. The primary meaning does not involve the element of negligence as one of its essen-

tial factors. Heeg v. Licht, 80 N.Y. 579, 36 Am. Rep. 654. One acts sometimes at one's peril. In such circumstances the duty to desist is absolute whenever conduct, if persisted in, brings damage to another."

Kelly v. National Lead Co. (Mo. App. 1948), 210 S.W. 2d 738, holds:

"It is well recognized that for one to permit fumes and gases to escape from his premises and be deposited on the premises of another to his injury and damage, may constitute an actionable wrong in the maintenance of a nuisance. . . . The doctrine is not limited to any particular character of industry and it has been expressly held that the emission of fumes and gases from a sulphuric acid plant may constitute a nuisance, although the business itself is not unlawful, nor is the plant a nuisance per se."

The case of Ingmundson v. Midland Continental R. R. (1919), 42 N.D. 455, 173 N.W. 752, 6 A.L.R. 714, holds that the owner of land possesses the right to enjoy the same free from the pollution of air thereupon, for violation of which right an action in the nature of trespass to realty may be maintained.

The recent case of Gotreaux v. Gary, La., 1957, 94 So. 2d 293, imposes the rule of strict liability when during airplane spraying operations spray was carried upon plaintiff's cotton crop, damaging it.

We find nothing in the law anywhere remotely tending to sustain the position contended for by the Appellant in the Petition for Rehearing.

CONCLUSION

The facts, most of them agreed upon in advance of trial, the remainder admitted during the course of the trial or proved by the weight of satisfactory and convincing evidence, are that the Appellant, in the course of the operation of an industrial plant, belched forth a continuous stream of poisonous effluent, in gaseous, liquid and solid form, with which Appellant invaded the adjacent farm lands whereon the Appellees lived, and by which it injured and impaired the health and well-being of the Appellees.

This invasion of the farm lands, the home of the Appellees, by the Appellant with its toxic compounds is admitted by Appellant, and avoidance of liability for the consequences is sought on the basis of two contentions, one factual and the other legal.

The factual contention has been that the toxic compounds did no harm in the amounts to which Appellees were exposed, did not present a "risk to the health of surrounding residents" (Ptn. p. 14). This factual issue was determined against the Appellant by the verdicts of the jury. And in spite of the assertions of Appellant on this appeal, the amount of any particular poison or combination of poisons which an individual can tolerate, a tolerance level, is a question of fact and not a question of law.

The legal contention which Appellant poses is that the Appellant should not be held liable for this admitted invasion with these toxic compounds, because, even when due care is used, these compounds necessarily escape as an incident of operating an aluminum reduction plant,

and, consequently, it is only when less than due care is used in minimizing the escape that liability attaches for ensuing damage to the neighbors or their property.

This monstrous doctrine has no support in law.

As we have shown, when toxic compounds likely to injure if permitted to escape, are allowed to escape and settle in the neighborhood to the injury of a neighbor, either:

1. The person permitting the escape of the toxins is liable, irrespective of fault, as a trespasser;

2. The person permitting the escape is liable for negligence, which is implied as a matter of law;

3. The person permitting the escape is liable for negligence, which must be proved by a preponderance of the evidence, but with an inference of negligence, sufficient by itself to support a finding of negligence, aiding the injured neighbor asserting the negligence.

On any of these rules, or on the well recognized and oft repeated rule that no one may maintain a nuisance to the annoyance or hurt of his neighbor, the judgments in these cases are sustained and should be affirmed.

The decision of this Court, previously rendered, is sound, and fully in accord with the law and the facts, and should be reaffirmed.

Respectfully submitted,

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ACKNOWLEDGMENT OF SERVICE

Due service of the foregoing Brief in Answer to Petition for Rehearing by receipt of three certified copies thereof is hereby admitted this 11th day of September, 1957.

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Of Attorneys for Appellant